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7 Attorneys for Defendants K-M Industries  
8 Holding Co. Inc.; K-M Industries Holding Co.  
Inc. ESOP Plan Committee; and CIG ESOP Plan Committee

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

I, Terence F. Young, declare:

1. I am an attorney licensed to practice in the State of California and before this Court. I am associated with Lovitt & Hannan, Inc., attorneys for Defendants K-M Industries Holding Co. Inc., K-M Industries Holding Co. Inc. ESOP Plan Committee, and CIG ESOP Plan Committee in this matter. I have custody of the relevant files of Lovitt & Hannan related to this action and am familiar with the contents thereof. I make this declaration in support of said defendants' opposition

<sup>1</sup> to plaintiffs' motion for class certification.

2       2. The facts stated herein are known to me personally and if called to testify thereto I  
3 could do so competently.

4           3. Attached hereto as Exhibit A are true and correct copies of excerpts from the  
5 deposition of Thomas Fernandez taken in this matter on April 21, 2008.

7           4. Attached hereto as Exhibit B are true and correct copies of excerpts from the  
8 deposition of Lora D. Smith taken in this matter on April 16, 2008.

9       5. Attached hereto as Exhibit C are true and correct copies of excerpts from the  
0 deposition of Tosha Thomas taken in this matter on April 18, 2008.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 12, 2008 at San Francisco, California

/s/  
Terence F. Young

**EXHIBIT A**

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3 SAN FRANCISCO AND OAKLAND DIVISION

4  
5 **CERTIFIED**  
6 **COPY**

7 THOMAS FERNANDEZ, et al., )  
8 vs. ) Plaintiffs, ) Case No.  
9 K-M INDUSTRIES HOLDING CO., INC., et al., ) C-06-07339 CW  
10 Defendants. )  
11 )  
12 )

13  
14 VIDEOTAPED DEPOSITION OF THOMAS FERNANDEZ  
15 April 21, 2008  
16 San Francisco, California  
17  
18  
19  
20  
21

22 Reported by:  
23 EMI ALBRIGHT  
24 RPR, CSR No. 13042  
25 Job No. 79887

1 say until October of '96?

2 MR. LOVITT: Yes.

3 BY MR. LOVITT:

4 Q Did you have any employment between the  
09:52 5 time that you left Capital Insurance Group and the time  
6 that you joined Castle Inspection Service?

7 A Well --

8 MS. HASSELMAN: Hang on a second. Ron, I  
9 think there is just some confusion in the time frame.  
09:52 10 If I can just make a suggestion, I think you might just  
11 clarify the circumstances of the CIG employment and the  
12 Castle Inspection Service. I'm not sure they were  
13 sequential. So I think that might be the confusion in  
14 the question.

09:53 15 THE WITNESS: I can clarify the employment  
16 with Castle and Capital.

17 BY MR. LOVITT:

18 Q Why don't you do that for us.

19 A For most of the time that I was working for  
09:53 20 Capital Insurance Group, I was also a consultant for  
21 Castle Inspection Service in addition to my employment  
22 at Capital Insurance Group.

23 Q I see. So that was a part-time employment  
24 for Castle?

09:53 25 A That's correct.

1 Q And you had full time employment with CIG?

2 A That's correct.

3 Q And was CIG aware that you were working  
4 part time for Castle?

09:53 5 A To the best of my knowledge at the time  
6 they were not.

7 Q Who was your boss at CIG?

8 A During which time period?

9 Q During the July of 19 -- July of 1997?

09:54 10 A Excuse me. I am a little confused. I am looking at the  
11 complaint, which is Exhibit 147. And I am not going to  
12 get heavily involved in that right now. But I  
13 understand that you worked for CIG from July of 1996  
14 until October of 2005; is that correct?

09:54 15 A I believe so.

16 Q In 2005 who was your boss at CIG?

17 A In 2005 my immediate supervisor at the time  
18 was Steve Lehrke.

19 Q And was Mr. Lehrke aware that you had  
09:55 20 another employment with Castle?

21 A No, I do not believe he was.

22 Q Did you consider informing Mr. Lehrke that  
23 you were also working for Castle?

24 A No, I did not.

09:55 25 Q Did you have any particular reason for not

1 wanting Mr. Lehrke to have that information?

2 MS. HASSELMAN: Objection. Assumes facts  
3 not in evidence.

4 A I did not see any reason why he should be  
09:55 5 informed.

6 BY MR. LOVITT:

7 Q Were you aware of a policy at CIG that full  
8 time employees at CIG were to be working full time and  
9 were not to engage in other employment?

09:56 10 MS. HASSELMAN: Objection. Assumes facts  
11 not in evidence.

12 A At the time that I was working for Castle  
13 Inspection Group, I was not specifically aware of that  
14 policy.

09:56 15 BY MR. LOVITT:

16 Q Was it your understanding that if you had  
17 revealed that you had other employment to Mr. Lehrke or  
18 others at CIG that it might have some negative impact on  
19 your employment at CIG?

09:56 20 MS. HASSELMAN: Objection. Assumes facts  
21 not in evidence.

22 A I had thought that it could have been a  
23 possibility.

24 BY MR. LOVITT:

09:56 25 Q So -- let's see. So the dates on

1 obviously, I was not working for Castle. There were  
2 several lengthy time periods after the initial year that  
3 I worked for CIG when I had not received any work from  
4 Castle Inspection Service.

09:58 5 Q Now, was it your understanding when you  
6 were working for Castle Inspection Service that you were  
7 working part time or full time?

8 A Part time.

9 Q So apart from the first -- roughly the  
09:58 10 first year at CIG, during the rest of your term at CIG,  
11 you were at the same time except for those periods when  
12 you weren't getting any work, you were working for  
13 Castle?

14 MS. HASSELMAN: Objection. Vague and  
09:59 15 compound and ambiguous.

16 A Rephrase the question.

17 BY MR. LOVITT:

18 Q Yeah, you started at CIG in July of '96.  
19 Apparently you started at Castle in July of '97;  
09:59 20 correct?

21 A Approximately the right day, yes.

22 Q So the first year you worked at CIG, you  
23 weren't affiliated with Castle; correct?

24 A That is correct.

09:59 25 Q After the first year that you worked for

1 CIG, for the remaining time that you worked for CIG, you  
2 were also employed by Castle?

3 MS. HASSELMAN: Objection. Asked and  
4 answered.

10:00 5 A I believe I have gone over that already.

6 BY MR. LOVITT:

7 Q What was your answer?

8 MS. HASSELMAN: You can answer.

9 A That's right.

10:00 10 BY MR. LOVITT:

11 Q Now, what job did you have at CIG?

12 A Loss control representative.

13 Q What does a loss control representative do?

14 A Loss control representative evaluates  
15 various types of risks that will be under -- that will  
16 be under various types of risks that the company is  
17 going to be taking. The loss control representative  
18 evaluates the risk, possible areas of loss involved with  
19 the particular risk subject to certain parameters, and  
20 possibly makes some recommendations to possibly reduce  
21 different types of risks inherent with certain types of  
22 insurance and certain types of businesses and  
23 properties, and also provides factual information to the  
24 underwriters in regards to particular risks.

10:01 25 Q And what does a high value specialist, the

1 work that you did at Castle Inspection Service, what  
2 does that job entail?

3 A Very similar except that's looking at high  
4 value single family home real estate. We are looking at  
10:01 5 different types of construction, unique construction  
6 features, and putting together not only underwriting  
7 information for the underwriters but also detailed  
8 construction and pricing information and hazard  
9 information for the underwriters of these types of  
10:01 10 risks.

11 Q Did you have any kind of -- any type of  
12 pension benefits at Castle?

13 A At where?

14 Q At Castle Inspection Service were there  
10:02 15 any -- was there a pension plan that you were involved  
16 with?

17 A No.

18 Q Was there an ESOP plan?

19 A No.

10:02 20 Q Was there any kind of retirement plan?

21 A No.

22 Q Were you -- were you an employee or an  
23 independent contractor at Castle?

24 A Independent contractor.

10:02 25 Q How many hours a week did you devote to

1 MS. HASSELMAN: Objection. Vague and  
2 ambiguous and compound.

3 A I do not remember a response like that.

4 BY MR. LOVITT:

10:10 5 Q Now, apart from these three people, since  
6 you left CIG have you had communication with anyone  
7 else?

8 A Anyone else at CIG?

9 Q At CIG, yeah?

10:11 10 A Not that I can remember.

11 Q Now, were you aware at the time that you  
12 were at CIG that CIG was a subsidiary of a holding  
13 company?

14 A I was.

10:11 15 Q And were you aware that the holding company  
16 also had a subsidiary that was in the paint business?

17 A I was.

18 Q And that paint business was Kelly-Moore  
19 Paint Company; is that correct?

10:11 20 A That's correct.

21 Q Now, do you have any professional or  
22 friendly relationship with anyone working for the Paint  
23 Company?

24 MS. HASSELMAN: Objection. Compound.

10:11 25 Vague.

1 A No, I do not.

2 BY MR. LOVITT:

3 Q Have you ever had such a relationship?

4 MS. HASSELMAN: Objection. Vague and  
10:12 5 compound.

6 A No, I have not.

7 BY MR. LOVITT:

8 Q Do you know the name of any person past or  
9 present who was an employee of the Paint Company?

10:12 10 MS. HASSELMAN: Objection. Vague and  
11 ambiguous.

12 A I'm sorry. What was the question again?

13 MR. LOVITT: Read it back, please, Emi.

14 (Record read by the reporter.)

10:12 15  
16 THE WITNESS: I remember -- the answer  
17 would be yes.

18 BY MR. LOVITT:

19 Q And what is the name of that person?

10:12 20 A I forgot the last name, but the first name  
21 I believe was a Toshia.

22 Q Is that person Toshia Thomas?

23 A I think it is.

24 Q How did you -- how did you make her  
10:13 25 acquaintance?

1           A     I have never met her nor have I ever spoken  
2 with her. I was shown a copy of a legal form with her  
3 name on it I believe last week in speaking with my  
4 attorneys.

10:13   5       Q     Apart from Toshia Thomas, do you know the  
6 name of any person who has ever worked for Kelly-Moore  
7 Paint?

8           MS. HASSELMAN: Objection. Vague.

9           A     No.

10:13 10      BY MR. LOVITT:

11          Q     What is your understanding of your  
12 responsibilities as a representative plaintiff in a  
13 class action lawsuit?

14          A     My understanding is that I am not to  
15 undertake any actions which would be detrimental to the  
16 interest of any of the other class members.

17          Q     Who do you understand those class members  
18 to be generically without referring to anybody's name?

19          MS. HASSELMAN: Objection. Vague and  
10:14 20      ambiguous. Calls for a legal conclusion.

21          A     All people who work for Kelly-Moore Paint  
22 and all people who work for Capital Insurance Group.

23      BY MR. LOVITT:

24          Q     What do you understand your financial  
10:14 25      responsibilities are with respect to this lawsuit?

1 Q Please show the witness Exhibit 153. 153  
2 purports to be a quarterly employee meeting dated  
3 November 9, 1999. And this is not the meeting. This is  
4 somehow a document in connection with the meeting.

11:04 5 Have you ever seen this one before?

6 A I don't remember.

7 Q The document has Bates No. CIG-ESI 00001542  
8 through 1542.003.

9 Now, you mentioned that you had meetings at  
11:04 10 your branch on a periodic basis; is that correct?

11 A That's correct.

12 Q Did you have quarterly employee meetings?

13 A The best recollection I have that these  
14 were minutes or selected parts of a meeting that took  
11:04 15 place at the branch office in Monterey. And these were  
16 questions that came up and were answered at that time,  
17 and then the answers were distributed in this form.

18 Q Distributed to whom?

19 A All employees of CIG.

11:05 20 Q Now, I will ask you again is this the kind  
21 of document you would normally put in your employee  
22 folder?

23 A This document, no.

24 Q So how would you treat a document like this  
11:05 25 after you received it?

1 MS. HASSELMAN: Objection. Calls for  
2 speculation. Assumes facts not in evidence.

3 A I would normally discard such a document.

4 BY MR. LOVITT:

11:05 5 Q On the first page of the document there's a  
6 question that says, No. 1, what is the status of the  
7 ESOP and what is the timeline for preparing statements  
8 of employees' ESOP account status for all participants?  
9 Please review how it works, explain the pretax savings  
11:06 10 implications of participation on the 401(k) versus the  
11 ESOP.

12 Do you recall -- do you recall that issue  
13 being discussed at an employee meeting?

14 A No.

11:06 15 Q It says, response, as previously announced  
16 the ESOP has been closed and 8,400,000 shares, paren,  
17 42 percent of CIG, have been bought from K-M Industries  
18 Holding Company Inc. for \$55 million. We expect to  
19 provide each member of the ESOP with statements of  
11:06 20 individual accounts within the first days -- first 60  
21 days of each new calendar year beginning in the year  
22 2000.

23 Were you made aware at some point that  
24 42 percent of the stock in K-M Industries Holding  
11:07 25 Company Inc. had been purchased by the ESOP for

1 \$55 million?

2 A Yes, I was.

3 Q Did you ever do an arithmetic calculation  
4 to see how much per share --

11:07 5 MS. HASSELMAN: Objection. Vague.

6 BY MR. LOVITT:

7 Q -- that the ESOP had paid for the stock?

8 A No, I did not.

9 Q Were you interested in determining whether  
11:07 10 or not the ESOP had paid fair value for the shares that  
11 it had?

12 MS. HASSELMAN: Objection. Vague. Calls  
13 for a legal conclusion.

14 A No, I was not.

11:07 15 BY MR. LOVITT:

16 Q At some point you became interested in how  
17 much the ESOP had paid for its shares?

18 MS. HASSELMAN: Objection. Vague and  
19 misstates prior testimony.

11:08 20 A At some point during which particular time  
21 period?

22 BY MR. LOVITT:

23 Q Either during your employment or after?

24 MS. HASSELMAN: Same objections.

11:08 25 A I'm sorry. Would you repeat the question?

1 BY MR. LOVITT:

2 Q Did you at some point during your  
3 employment at CIG become interested in finding out how  
4 much per share the ESOP had paid for its stock?

11:08 5 A No.

6 Q Did you become interested in that question  
7 at some point after you terminated your employment?

8 A No.

9 Q Have you ever cared about the issue of how  
11:09 10 much the ESOP paid for its shares?

11 MS. HASSELMAN: Objection. Vague. Calls  
12 for a legal conclusion.

13 A No.

14 BY MR. LOVITT:

11:09 15 Q 156, please. Please review Exhibit 156 and  
16 I will have a couple of questions about it. While you  
17 are reviewing it, I will state for the record that  
18 Exhibit 156 is a document on the California Insurance  
19 Group letterhead addressed to CIG team members and  
11:10 20 shareholders, re, the ESOP statement, plan year 2000,  
21 signed by Peter M. Cazzolla, Bates No. P 054.

22 Have you ever seen this document before?

23 A I'm not sure.

24 Q Now, would this be one of the kinds of  
11:10 25 documents that you would normally want to retain in the

1 A Has something to do with the ESOP.

2 Q In the middle of the report, just like one  
3 that we saw earlier, it says, you have the right to  
4 receive a copy of the full annual report or any part  
12:33 5 thereof on request. The items listed below are included  
6 in that report. One, an accountant's report, two,  
7 financial information, and, three, assets held for  
8 investments?

9 MS. HASSELMAN: I am going to object that  
12:33 10 that mischaracterizes a prior document and the documents  
11 speak for themselves.

12 MR. LOVITT: Okay.

13 BY MR. LOVITT:

14 Q Then it goes on to say in the last  
12:33 15 paragraph, you also have the legally protected right to  
16 examine the annual report at the main office of the  
17 plan, K-M Industries Holding Company Inc., 987  
18 Commercial Street, San Carlos, California, 94070, and at  
19 the U.S. Department of Labor in Washington, D.C.

12:34 20 Did you ever make an attempt prior to the  
21 suit being filed to obtain additional information about  
22 the ESOP?

23 MS. HASSELMAN: Objection. Vague and  
24 ambiguous.

12:34 25 A No, I did not.

1 anything that Mr. Moore did?

2 MS. HASSELMAN: Objection. Vague and  
3 ambiguous. Compound. Calls for a legal conclusion.

4 A No.

14:13 5 BY MR. LOVITT:

6 Q Can you -- can you identify anything that  
7 Mr. Moore did that you consider to be improper other  
8 than in connection with selling his stock?

9 MS. HASSELMAN: Objection. Calls for a  
14:13 10 legal conclusion. Asked and answered. Vague and  
11 ambiguous.

12 A No.

13 BY MR. LOVITT:

14 Q Okay. We are back to Exhibit 228. If you  
14:14 15 look on the second page, which is 00002713.002, and the  
16 beginning of the first big paragraph on the page says,  
17 as presented to you and discussed with team members  
18 during previous team meetings, the worst case is if the  
19 asbestos liability caused Kelly-Moore Paint to become  
20 insolvent with the value of our ESOP shares -- no --  
21 then the value of our ESOP shares could be zero up to  
22 some positive dollar value depending on the ability of  
23 Kelly-Moore Paint's assets and insurance to pay for the  
24 asbestos liabilities. Under this worst case scenario  
25 CIG may be faced with a need to seek new investors.

1 Now, when -- I am assuming that you were  
2 apprised of this information in August of '04 since this  
3 document was distributed to all employees at CIG? Is  
4 that a correct assumption?

14:15 5 A That's correct.

6 Q Okay. What was your reaction to this  
7 information, this worst case scenario information?

8 MS. HASSELMAN: Objection. Vague and  
9 ambiguous. Vague as to time.

14:15 10 A I was concerned.

11 BY MR. LOVITT:

12 Q At this time did you consider seeking other  
13 employment because of that concern?

14 MS. HASSELMAN: Objection. Vague and  
14:16 15 ambiguous.

16 A Yes.

17 BY MR. LOVITT:

18 Q Well, if you lost the value of your ESOP  
19 shares, you'd still be getting your salary; isn't that  
14:16 20 right?

21 MS. HASSELMAN: Objection. Calls for  
22 speculation.

23 A That's correct.

24 BY MR. LOVITT:

14:16 25 Q I mean, were you concerned that CIG would

1 just go out of business as a result of this ESOP -- this  
2 asbestos litigation?

3 MS. HASSELMAN: Objection. Vague and  
4 ambiguous and vague as to time.

14:17 5 BY MR. LOVITT:

6 Q The time, just in case there is any doubt  
7 about it, I am talking about August of '04.

8 A No.

9 Q So did you do anything about your concerns  
14:17 10 in the August '04 time frame or shortly thereafter?

11 MS. HASSELMAN: Objection. Vague.

12 A No.

13 BY MR. LOVITT:

14 Q The middle paragraph says, please be  
14:17 15 assured that all possible actions are being considered  
16 to minimize the impact Kelly-Moore's asbestos  
17 liabilities will have on the K-M Industries I stock we  
18 own. The stock valuation is still in progress and we  
19 will be finalized once the appraisers are relatively  
14:18 20 confident placing a value on Kelly-Moore Paint Company.

21 Did you think the company was being  
22 forthright and correct in telling you and the others  
23 employed by CIG that all possible actions were being  
24 considered to minimize the impact of the Kelly-Moore  
14:18 25 asbestos liabilities?

1 with what you responded to the first or second question,  
2 those were the obligations -- maybe you could help me  
3 understand. I am having difficulty --

4 A I think you basically asked why -- why were  
15:58 5 you filing this lawsuit, what did you think was wrong.

6 Q Uh-huh.

7 A And I explained it, and that -- yeah.

8 Q I guess what I am trying to understand is  
9 why North Star Trust Company has been named as a  
15:58 10 defendant and what facts you have to support the  
11 allegations against North Star. So maybe if we just  
12 break that down into two questions, the first being do  
13 you understand why you've sued North Star as a  
14 defendant?

15:59 15 MS. HASSELMAN: Same objections as before.  
16 Calls for a legal conclusion. And the same caution to  
17 feel free to answer from your own knowledge but make  
18 sure you don't reveal any communications with counsel.

19 A My own knowledge is that they are somehow  
15:59 20 involved with Kelly-Moore.

21 BY MR. SULLIVAN:

22 Q And do you know how they are involved?

23 A Administrator of some sort for the ESOP.

24 Q And do you have any other facts specific to  
15:59 25 the duties or responsibilities that North Star has?

1 MS. HASSELMAN: Same objections. Calls  
 2 for a legal conclusion.

3 A Not that I can remember.

4 BY MR. SULLIVAN:

15:59 5 Q And when you say not that you can remember,  
 6 does that mean that there are no facts or does that mean  
 7 that there were facts that you don't remember as we are  
 8 talking about it today?

9 MS. HASSELMAN: Same objections. Calls  
 16:00 10 for a legal conclusion. Calls for speculation.

11 A Probably not facts that I can remember  
 12 today.

13 BY MR. SULLIVAN:

14 Q So you think there are facts that assert --  
 16:00 15 that support your claims against North Star?

16 A I don't know.

17 Q But it's fair to say that today you can't  
 18 recall any facts that support your claim against North  
 19 Star?

16:00 20 MS. HASSELMAN: Objection. Vague and  
 21 ambiguous. Calls for a legal conclusion.

22 A That's correct.

23 BY MR. SULLIVAN:

24 Q And do you have any personal knowledge of  
 16:01 25 any facts to suggest that any of the ESOP valuations

1 were improper?

2 MS. HASSELMAN: Objection. Calls for a  
3 legal conclusion.

4 A No.

16:01 5 MS. HASSELMAN: Calls for expert  
6 testimony. I'm sorry, I realize that was belated, but I  
7 just want to get that in to the prior question as well.

8 BY MR. SULLIVAN:

9 Q Do you have Exhibit 147 in front of you?

16:01 10 Have you seen this before?

11 A Yes.

12 Q Did you review this document before it was  
13 filed on January 18, 2008?

14 A No.

16:02 15 Q Did you have an opportunity to review the  
16 original complaint before it was filed?

17 A No.

18 Q Did you have any input into the contents of  
19 the original complaint?

16:02 20 MS. HASSELMAN: Objection. Calls for  
21 attorney client communications.

22 BY MR. SULLIVAN:

23 Q I am just looking for a yes or no answer.

24 MS. HASSELMAN: That calls for a legal  
16:02 25 conclusion as well.

1 A Yes.

2 BY MR. SULLIVAN:

3 Q And is there anything that you think should  
4 be in the complaint, the original complaint, that  
16:02 5 wasn't?

6 MS. HASSELMAN: Objection. Calls for a  
7 legal conclusion. You also have not shown him the  
8 original complaint and he hasn't had an opportunity to  
9 review that.

16:02 10 BY MR. SULLIVAN:

11 Q Is there anything that you think should be  
12 in the second amended complaint that is Exhibit 147 that  
13 is not?

14 MS. HASSELMAN: Same objections. It's a  
16:03 15 long document. If you want him to review it, he should  
16 have time to review that. Also calls for a legal  
17 conclusion.

18 A I would say I am not sure.

19 BY MR. SULLIVAN:

20 Q What losses do you claim that you have  
21 suffered as a result of the actions of the defendants  
22 that have been named in the complaint?

23 MS. HASSELMAN: Objection. Calls for a  
24 legal conclusion. Calls for expert testimony.

16:03 25 A I'm not sure of the exact losses.

1 STATE OF CALIFORNIA )  
2 : ss )  
3 County of Alameda )  
4

5 I, the undersigned, a Certified Shorthand Reporter  
6 of the State of California, do hereby certify: That the  
7 foregoing proceedings were taken before me at the time and  
8 place herein set forth; that any witnesses in the foregoing  
9 proceedings, prior to testifying, were placed under oath;  
10 that a verbatim record of the proceedings was made by me  
11 using machine shorthand which was thereafter transcribed  
12 under my direction; further, that the foregoing is an  
13 accurate transcription thereof.

14 I further certify that I am not a relative,  
15 employee, attorney or counsel of any party to this action or  
16 relative or employee of any such attorney or counsel and that  
17 I am not financially interested in the said action or the  
18 outcome thereof;

19 IN WITNESS WHEREOF, I have this date subscribed my  
20 name.

21 Dated: APR 29 2008

22 Emi Albright

23  
24 EMI ALBRIGHT, CSR No. 13042  
25

**EXHIBIT B**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

THOMAS FERNANDEZ, et al.,

Plaintiffs,

vs.

No. C 06-07339 CW

K-M INDUSTRIES HOLDING CO.,  
INC., et al.,

Defendants.

CERTIFIED  
COPY

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VIDEOTAPED DEPOSITION OF LORA D. SMITH

San Francisco, California

Wednesday, April 16, 2008

VOLUME 1

Reported by:

TRACY L. PERRY

CSR No. 9577

CHRIS TE SELLE

CSR No. 10836

JOB No. 84325

1 CIG and you were living in Waterford?

09:37:40 2 A Correct.

09:37:46 3 Q When you -- when you changed addresses did  
4 you -- did you notify the post office or any -- that they  
5 could forward your mail to your new address?

09:37:57 6 A Yes.

09:37:59 7 Q When you moved did you notify the people at CIG  
8 that you had moved and give them your new address?

09:38:05 9 A Yes.

09:38:08 10 Q Who did you speak to at CIG to give them that  
11 information, do you remember?

09:38:12 12 A No, I don't remember.

09:38:18 13 Q Have you been employed since you left CIG?

09:38:20 14 A Yes.

09:38:23 15 Q Where were you employed?

09:38:24 16 A I helped a disabled man in Waterford, was a  
17 caretaker.

09:38:31 18 Q Mm-hmm. Is that what you -- is that the reason  
19 that you moved to Waterford, to take care of this  
20 particular person?

09:38:36 21 A No.

09:38:38 22 Q And so how long did you work I guess as an aid  
23 of some sort to a disabled person? How long did you do  
24 that -- were you doing that work?

09:38:56 25 A Somewhere around a year.

09:38:57 1 Q Okay. Apart from that, have you had any other  
2 employment since you left CIG?

09:39:06 3 A No.

09:39:16 4 Q What was your job at CIG?

09:39:19 5 A Assistant underwriter.

09:39:21 6 Q In the Modesto office?

09:39:22 7 A Yes.

09:39:24 8 Q What does an assistant underwriter do?

09:39:26 9 A Assists the main underwriter.

09:39:35 10 Q Good. And who was the main underwriter at the  
11 time?

09:39:38 12 A Lynn Winters.

09:39:39 13 Q Lynn?

09:39:39 14 A Mm-hmm.

09:39:40 15 Q And was he -- was he your boss?

09:39:42 16 A She.

09:39:43 17 Q Oh, Lynn was -- Lynn. Okay.  
18 Was she your boss?

09:39:47 19 A No.

09:39:50 20 Q Who -- who was actually your boss at CIG?

09:39:53 21 A Jim Isham. Jim Isham.

09:40:01 22 Q And what was his position at the time?

09:40:03 23 A Manager of the branch.

09:40:05 24 Q Managed the whole --

09:40:05 25 A Mm-hmm.

09:45:01 1           What month did you -- did you terminate your  
2 employment at CIG in 2001?

09:45:14 3           A    October.

09:45:19 4           Q    Why did you -- why did you leave?

09:45:21 5           A    I had a baby and decided to stay home and raise  
6 him myself.

09:45:26 7           Q    Were you happy with your employment there? Were  
8 you -- did you feel that you were appreciated and treated  
9 well?

09:45:33 10          MS. HASSELMAN: Objection; vague and compound.

09:45:35 11          THE WITNESS: Yes, very much.

09:45:46 12          BY MR. LOVITT:

09:45:46 13          Q    What caused you to have the idea that you should  
14 be a plaintiff in a lawsuit against the company --

09:45:54 15          MS. HASSELMAN: I'll just --

09:45:54 16          BY MR. LOVITT:

09:45:54 17          Q    -- and others?

09:45:56 18          MS. HASSELMAN: Just to clear up the parameters  
19 around the question, answer -- if you can answer in your  
20 own words without getting into any communications with  
21 counsel, you can answer that, but just make sure that you  
22 don't discuss any communications with your lawyers.

09:46:18 23          THE WITNESS: Because I was told I would be paid for  
24 my shares on a certain date and wasn't.

09:46:23 25          BY MR. LOVITT:

09:46:23 1 Q Who told you you'd be paid at a certain date?

09:46:26 2 A Debbie in HR in the Monterey branch.

09:46:34 3 Q And when did they tell you this?

09:46:37 4 A In 2002 and 2003 and in 2004.

09:46:46 5 Q After you left?

09:46:46 6 A Yes.

09:46:52 7 Q What did they tell you?

09:46:55 8 A That I had to have five years of discontinued  
9 service from the company.

09:46:59 10 Q Mm-hmm.

09:47:00 11 A After that time, the first calendar year, after  
12 the five years of discontinued service, my shares would  
13 be paid to me.

09:47:10 14 Q And so they -- Debbie -- Debbie and who else  
15 told you this?

09:47:17 16 MS. HASSELMAN: Objection; misstates testimony.

09:47:21 17 BY MR. LOVITT:

09:47:21 18 Q Debbie and who else?

09:47:22 19 MS. HASSELMAN: Same objection.

09:47:24 20 BY MS. LOVITT:

09:47:24 21 Q What's Debbie's last name?

09:47:26 22 A I'm not sure.

09:47:32 23 Q Did they tell you in writing or did they tell  
24 you orally?

09:47:35 25 A Over the phone.

09:47:38 1 Q And did you have any familiarity with -- with --  
2 with something in writing that explained the plan to you?

09:47:49 3 MS. HASSELMAN: Objection; vague.

09:47:51 4 BY MR. LOVITT:

09:47:51 5 Q I mean had you ever seen -- had you ever seen a  
6 written description of the ESOP plan that was in force at  
7 the time that you were working there?

09:48:00 8 A Yes.

09:48:02 9 Q And had you ever read it?

09:48:07 10 A Yes.

09:48:09 11 Q But -- apparently you read it, but you still  
12 wanted to talk to somebody about when you'd be entitled  
13 to your distribution; is that right?

09:48:18 14 A Yes.

09:48:18 15 MS. HASSELMAN: Objection; argumentative.

09:48:23 16 BY MR. LOVITT:

09:48:23 17 Q Now, you mentioned in the -- in the complaint  
18 that's been filed, you said something to the effect that  
19 you called the company in 2006 and asked them for a  
20 distribution; is that correct?

09:48:37 21 MS. HASSELMAN: Objection; the complaint speaks for  
22 itself.

09:48:41 23 BY MR. LOVITT:

09:48:41 24 Q Is that correct?

09:48:41 25 A Yes.

10:11:32 1 BY MR. LOVITT:

10:11:32 2 Q Okay. No one other than a lawyer has ever told  
3 you that there is a problem regarding asbestos and the  
4 value of your ESOP shares, correct?

10:11:57 5 MS. HASSELMAN: Object to the form.

10:11:59 6 THE WITNESS: Yes.

10:12:03 7 MS. HASSELMAN: And it's -- the question is  
8 ambiguous. I'll add that objection to the question, as  
9 well.

10:12:23 10 BY MR. LOVITT:

10:12:23 11 Q Now, you understand you're a plaintiff in a  
12 class action lawsuit; is that correct?

10:12:26 13 A Yes.

10:12:27 14 Q And what do you consider your responsibilities  
15 to be as a plaintiff in a class action?

10:12:41 16 A To represent the employees.

10:12:44 17 Q Which employees?

10:12:47 18 A Employees that have -- that are participants in  
19 the ESOP program.

10:12:52 20 Q Now, do you mean employees at CIG?

10:13:00 21 MS. HASSELMAN: Objection; calls for a legal  
22 conclusion.

10:13:05 23 THE WITNESS: Employees or past employees like me.

10:13:09 24 BY MR. LOVITT:

10:13:09 25 Q Past employees of CIG.

10:13:10 1 Do you -- do you represent employees of  
2 Kelly-Moore Paint Company?

10:13:14 3 MS. HASSELMAN: Objection; calls for a legal  
4 conclusion and assumes facts not in evidence.

10:13:31 5 THE WITNESS: Can you repeat the question?

10:13:32 6 BY MR. LOVITT:

10:13:32 7 Q Do you consider it part of your responsibilities  
8 as a plaintiff in a class action to represent the  
9 interest of Kelly-Moore Paint Company employees?

10:13:43 10 MS. HASSELMAN: Objection; same objections, calls  
11 for a legal conclusion and assumes facts not in evidence.

10:13:49 12 THE WITNESS: No.

10:13:52 13 BY MR. LOVITT:

10:13:52 14 Q Have you ever been to the facilities at  
15 Kelly-Moore Paint Company in California, any of their  
16 offices or any of their stores?

10:14:04 17 A Yes.

10:14:05 18 Q Other than as a customer to buy paint, have you  
19 ever been to one of those places?

10:14:09 20 A No.

10:14:09 21 Q Do you have any friends or acquaintances that  
22 work for Kelly-Moore Paint Company?

10:14:16 23 A No.

10:14:16 24 Q Is it your understanding that Kelly-Moore Paint  
25 Company has an ESOP?

10:16:04 1 THE WITNESS: That's between my attorney and me.

10:16:06 2 BY MR. LOVITT:

10:16:06 3 Q Are you paying the cost?

10:16:13 4 A No.

10:16:15 5 Q And do you -- who is paying the cost?

10:16:20 6 MS. HASSELMAN: I'll -- I'll caution the witness not  
7 to reveal communications with counsel or the terms of  
8 retainer agreements.

10:16:26 9 Ron, it's -- you're fine to ask if we're  
10 advancing the cost or not, but I'm not going to let you  
11 get into any details of the retainer --

10:16:34 12 MR. LOVITT: I don't want to.

10:16:34 13 MS. HASSELMAN: -- or the terms of the retainer  
14 agreement.

10:16:36 15 BY MR. LOVITT:

10:16:36 16 Q Is it your understanding your attorney is  
17 advancing the costs of the litigation?

10:16:44 18 A Yes.

10:16:49 19 Q Now, do you have any understanding as to what  
20 the cost might be if you lose the lawsuit?

10:16:58 21 MS. HASSELMAN: I'll -- same objection; that this is  
22 very close to attorney-client communication issues. So  
23 if you have an understanding out of your own  
24 understanding, then you can answer the question, but if  
25 you have -- I would caution you not to get into any

1       communications with counsel.

10:17:12 2           THE WITNESS: I can't answer that.

10:17:25 3           BY MR. LOVITT:

10:17:25 4           Q     You understand that if the lawsuit is lost on  
5           your side that the attorneys representing the defendants  
6           would -- might claim an entitlement to a reimbursement of  
7           their cost in defending the lawsuit. Are you aware of  
8           that?

10:17:43 9           MS. HASSELMAN: Objection; calls for speculation and  
10          calls for a legal conclusion.

10:17:49 11           THE WITNESS: I don't know.

10:17:51 12           BY MR. LOVITT:

10:17:51 13           Q     You don't. Can you tell me whether you have an  
14          understanding as to -- whether you have an understanding  
15          as to your -- your responsibility to pay the entire cost  
16          of defending this lawsuit should you lose this lawsuit?

10:18:23 17           MS. HASSELMAN: Same objections. Calls for  
18          speculation, calls for a legal conclusion, and it assumes  
19          facts that aren't in evidence.

10:18:30 20           BY MR. LOVITT:

10:18:30 21           Q     Do you have an awareness of that?

10:18:32 22           MS. HASSELMAN: Same objections.

10:18:40 23           THE WITNESS: I don't know.

10:18:41 24           BY MR. LOVITT:

10:18:41 25           Q     Do you care?

10:18:41 1 MS. HASSELMAN: Same objections and argumentative.

10:18:58 2 THE WITNESS: Can you repeat the question?

10:19:00 3 BY MR. LOVITT:

10:19:00 4 Q I withdraw the question.

10:19:12 5 Are you prepared to pay the cost of the lawsuit

6 to the opposing parties if, in fact, you lose the

7 lawsuit?

10:19:17 8 MS. HASSELMAN: Same objections. Calls for

9 speculation, calls for a legal conclusion, and assumes

10 facts that aren't in evidence.

10:19:28 11 THE WITNESS: Can you repeat the question?

10:19:29 12 MR. LOVITT: Tracy, read it back, please.

10:19:13 13 (□The record was read as follows:

10:19:13 14 "QUESTION: Are you prepared to pay the cost

15 of the lawsuit to the opposing parties if,

16 in fact, you lose the lawsuit?")

10:19:38 17 MS. HASSELMAN: Same objections.

10:19:45 18 THE WITNESS: No.

10:19:59 19 MS. HASSELMAN: Ron, do you think we could take a

20 short restroom break before we get to that, please.

10:20:04 21 MR. LOVITT: Sure. Sure.

10:20:05 22 THE VIDEOGRAPHER: The time is 10:20. We are going

23 off record.

10:20:09 24 (Recess taken: 10:20 until 10:42 a.m.)

10:20:13 25 (Deposition Exhibit 147 was marked.)

10:20:13 1 MR. LOVITT: Yes. Okay.

10:20:13 2 Q Ms. Smith, I've handed you -- at least I think  
3 the reporter has handed you the -- the package of papers  
4 that's marked Exhibit Number 147. Exhibit Number 147 is  
5 the second amended complaint, class action, corrected,  
6 and it's a 24-page document.

10:20:13 7 If you could just thumb through this, I have a  
8 couple of very general questions. Well, let me just ask,  
9 have you ever seen this document before?

10:20:13 10 A Yes.

10:20:13 11 Q Did you see it before it was filed?

10:20:13 12 A No.

10:20:13 13 Q When did you -- when did you first see it?

10:20:13 14 A April 15th of 2008.

10:20:13 15 Q Oh, that means like yesterday?

10:20:13 16 A Correct.

10:20:13 17 Q Okay. Do you know what this document is?

10:20:13 18 A Yes.

10:20:13 19 MS. HASSELMAN: Objection; vague.

10:20:13 20 BY MR. LOVITT:

10:20:13 21 Q I'd like you to turn to page 3 of the document  
22 and look at paragraph number 6 and read it to yourself,  
23 and I have just a couple of questions about it.

10:20:13 24 Is that -- is paragraph 6 correct to the best of  
25 your knowledge?

10:20:13 1 BY MR. LOVITT:

10:20:13 2 Q You ever heard of a company called North Star?

10:20:13 3 A Yes.

10:20:13 4 Q What -- what relationship does North Star have,

5 to your knowledge, with -- with your ESOP shares?

10:20:13 6 A I don't know.

10:20:13 7 Q Do you know who the current trustee is of -- of

8 your ESOP program?

10:20:13 9 A No.

10:20:13 10 Q Do you know the name of any person or entity

11 that has ever served as a trustee for your ESOP plan?

10:20:13 12 A William Moore, I think.

10:20:13 13 Q I beg your pardon?

10:20:13 14 A William Moore, I think.

10:20:13 15 Q Now, when did Mr. Moore serve as a trustee?

10:20:13 16 A Well, at the very beginning.

10:20:13 17 Q Did he do anything wrong as a trustee?

10:20:13 18 MS. HASSELMAN: Objection; asked and answered, calls

19 for a legal conclusion. Ron, she's not -- she's not the

20 source of this information.

10:20:13 21 THE WITNESS: I don't know.

10:20:13 22 BY MR. LOVITT:

10:20:13 23 Q Did it ever come to your attention that North

24 Star, a company called North Star became a trustee of

25 your ESOP?

10:20:13 1 A Was I aware of that?

10:20:13 2 Q Yeah. Has it ever come to your attention that

3 North Star became or is a trustee of your ESOP?

10:20:13 4 MS. HASSELMAN: Objection; compound and ambiguous.

10:20:13 5 THE WITNESS: I wasn't aware they were the trustee.

6 I just had received a letter from them.

10:20:13 7 BY MR. LOVITT:

10:20:13 8 Q Okay. Now, North Star has been named as a

9 defendant in this lawsuit. To your knowledge, did North

10 Star do anything wrong?

10:20:13 11 MS. HASSELMAN: Same objections. Calls for a legal

12 conclusion. It's not her responsibility to know these

13 details, Ron.

10:20:13 14 MR. LOVITT: Please, no speaking.

10:20:13 15 Tracy, read it back, please.

10:20:13 16 (□The record was read as follows:

10:20:13 17 "QUESTION: Okay. Now, North Star has been

18 named as a defendant in this lawsuit. To

19 your knowledge, did North Star do anything

20 wrong?")

10:20:13 21 MS. HASSELMAN: Same objection. Calls for a legal

22 conclusion.

10:20:13 23 THE WITNESS: I don't know.

10:20:13 24 BY MR. LOVITT:

10:20:13 25 Q Do -- are you comfortable suing North Star under

17:19:14 1 Q. And could you state the date that you were  
17:19:16 2 hired by CIG.

17:19:19 3 A. The first day I started?

17:19:20 4 Q. Sure. Yeah.

17:19:21 5 A. September 16, 1996.

17:19:26 6 Q. And how about the date that you were  
17:19:28 7 terminated?

17:19:29 8 A. October 26, 2001.

17:19:41 9 Q. Can you tell me what you hope to  
17:19:43 10 accomplish by filing this lawsuit.

17:19:53 11 A. No.

17:20:10 12 Q. Well, is there a reason that you filed the  
17:20:12 13 lawsuit?

17:20:15 14 MS. HASSELMAN: Objection. Asked and answered.  
BY MR. SULLIVAN:

17:20:22 15 Q. How did you retain your lawyers for this  
17:20:24 17 case?

17:20:25 18 MS. HASSELMAN: Objection. You can answer to  
17:20:27 19 the extent that you have information from your own  
17:20:30 20 knowledge, but you shouldn't reveal any  
17:20:31 21 communications, or, whether conversation or written,  
17:20:36 22 with any of your attorneys.

17:20:38 23 THE WITNESS: I was referred.  
BY MR. SULLIVAN:

17:20:39 24 Q. Who referred you to them?

17:21:52 1 A. I did contact a couple of attorneys in  
17:21:54 2 Modesto, who wouldn't even touch it.

17:21:58 3 MS. HASSELMAN: I'm just going to remind, even,  
17:22:01 4 even if you didn't ultimately hire somebody as an  
17:22:05 5 attorney, if you contacted them for purposes of  
17:22:07 6 seeking legal advice, then your conversations with  
17:22:09 7 them and your communications with them are  
17:22:12 8 privileged.

17:22:12 9 So it's fine to answer the questions as  
17:22:14 10 he's asked them, but just let's, both for the  
17:22:20 11 questioner and for the witness, we shouldn't get  
17:22:22 12 into any communications that you had with any  
17:22:24 13 lawyers that you consulted.

17:22:26 14 THE WITNESS: Okay.

17:22:27 15 BY MR. SULLIVAN:

17:22:27 16 Q. And how many other attorneys did you  
17:22:29 17 contact prior to the Lewis Feinberg firm?

17:22:38 18 A. Two.

17:22:39 19 Q. Why do you want to be a class  
17:22:41 20 representative in this lawsuit?

17:22:51 21 A. I really can't answer that.

17:22:56 22 Q. When you say you can't answer, could you  
17:22:59 23 explain what you mean by that.

17:23:02 24 MS. HASSELMAN: I know my objection is late,  
17:23:03 25 but I'm going to object to the question of why do

17:23:06 1 you want to be a class representative in this  
17:23:08 2 lawsuit as vague.

17:23:13 3 THE WITNESS: I just don't have an answer for  
17:23:15 4 you.

17:23:16 5 BY MR. SULLIVAN:

17:23:17 6 Q. Okay.

17:23:18 7 Do you know what the responsibilities of  
17:23:20 8 being a class representative are?

17:23:27 9 A. No.

17:23:31 10 Q. Do you believe that you are qualified to  
17:23:33 11 be a class representative?

17:23:37 12 MS. HASSELMAN: Objection. Calls for a legal  
17:23:39 13 conclusion.

17:23:40 14 THE WITNESS: I don't know.

17:23:48 15 BY MR. SULLIVAN:

17:23:48 16 Q. Were you promised any compensation in  
17:23:50 17 exchange for acting as a class representative.

17:23:54 18 A. No.

17:24:07 19 Q. What losses do you claim to have suffered  
17:24:10 20 that you are seeking in the lawsuit?

17:24:13 21 MS. HASSELMAN: Objection. Vague and  
17:24:14 22 ambiguous.

17:24:16 23 BY MR. SULLIVAN:

17:24:17 24 Q. Are you seeking losses in this lawsuit?

17:24:20 25 MS. HASSELMAN: Same objection.

17:24:30 1 THE WITNESS: I don't know.

17:24:42 2 BY MR. SULLIVAN:

17:24:42 3 Q. What are you hoping for if you win?

17:24:51 4 A. To get the shares I was promised I would

17:24:54 5 get.

17:24:55 6 Q. And when you left in 2001, did you get

17:25:00 7 stock certificates, or anything of that nature?

17:25:04 8 MS. HASSELMAN: Objection, compound, and vague

17:25:05 9 and ambiguous.

17:25:08 10 THE WITNESS: Just my statements.

17:25:10 11 BY MR. SULLIVAN:

17:25:10 12 Q. Just your statements.

17:25:12 13 Did you get anything other than the

17:25:13 14 statements and the various correspondence that we

17:25:18 15 have covered related to your shares?

17:25:21 16 A. No.

17:25:25 17 Hold on. Maybe I remember getting the,

17:25:30 18 when you get a, when you leave, when you leave, you

17:25:33 19 get a check of, I can't remember the name of it, but

17:25:38 20 I think I got one of those, like a, I can't think of

17:25:45 21 the word.

17:25:48 22 Q. Did it summarize how many shares you had?

17:25:51 23 A. No. It had nothing to do with the shares,

17:25:54 24 and the company was just like, thank you for working

17:25:58 25 here, and, you know, you are leaving, and, so --

17:26:01 1 I can't think of the word I'm looking for,  
17:26:04 2 but it was something like that.

17:26:05 3 Q. So is that first phone call to Debby, I  
17:26:09 4 think you mentioned Debby in HR --

17:26:11 5 A. Uh-huh.

17:26:11 6 Q. -- in Monterey, that's when you first  
17:26:14 7 inquired about entitlement under the ESOP?

17:26:17 8 A. Yes.

17:26:20 9 Q. So, if you received your shares, would you  
17:26:23 10 have any other losses?

17:26:25 11 MS. HASSELMAN: Objection. Calls for a legal  
17:26:27 12 conclusion.

17:26:31 13 THE WITNESS: No.

17:26:37 14 BY MR. SULLIVAN:

17:26:37 15 \*DI Q. Earlier today, Mr. Lovitt introduced  
17:26:41 16 Exhibit 147, which is the second amended class  
17:26:44 17 action corrected complaint.

17:26:49 18 Did you have any input into the drafting  
17:26:51 19 of that document?

17:26:54 20 MS. HASSELMAN: Objection. Calls for  
17:26:55 21 attorney-client communications.

17:26:59 22 I'm not going to let her answer that.

17:27:03 23 BY MR. SULLIVAN:

17:27:04 24 Q. Are you going to go ahead and follow the  
17:27:05 25 instruction not to answer whether you had any input

17:27:07 1 as to the complaint?

17:27:08 2 A. Yes.

17:27:11 3 Q. Did you review the complaint before it was  
17:27:14 4 filed?

17:27:17 5 MS. HASSELMAN: Objection. Vague and  
17:27:17 6 ambiguous.

17:27:20 7 Which complaint are you referring to?

17:27:22 8 MR. SULLIVAN: Exhibit 147.

17:27:30 9 THE WITNESS: No.

17:27:32 10 BY MR. SULLIVAN:

17:27:33 11 Q. Were you aware that there were prior  
17:27:35 12 versions of the complaint that were filed before the  
17:27:37 13 January 18, 2008 date?

17:27:40 14 A. Yes.

17:27:42 15 Q. Had you reviewed any of the prior versions  
17:27:45 16 of the complaint before they were filed?

17:27:48 17 A. Yes.

17:27:52 18 Q. Which version of the complaint did you  
17:27:54 19 review?

17:27:57 20 A. You mean did I review it before it was  
17:27:59 21 actually filed?

17:28:00 22 Q. Yes.

17:28:01 23 A. No. I'm sorry. I take that back. I  
17:28:03 24 didn't read it before it was filed. I saw the  
17:28:05 25 complaint after it was filed.

17:29:40 1 go to page 13, it's paragraph 52.

17:29:55 2 Do you have any personal knowledge of

17:29:58 3 facts that support the statement that defendant

17:30:00 4 fiduciaries and KMH management intentionally

17:30:03 5 withheld information about the extent of KMH's

17:30:08 6 potential asbestos liability from participants who

17:30:10 7 were active employees, including plaintiffs

17:30:14 8 Fernandez and Thomas, that would have shown them and

17:30:16 9 other participants that the plan overpaid for KMH

17:30:22 10 stock?

17:30:22 11 MS. HASSELMAN: Objection. Calls for a legal

17:30:24 12 conclusion.

17:30:25 13 THE WITNESS: No.

17:31:10 14 BY MR. SULLIVAN:

17:31:11 15 Q. We talked earlier about the North Star

17:31:12 16 Trust Company, and it was a little unclear to me.

17:31:17 17 Do you know who North Star Trust Company

17:31:18 18 is?

17:31:19 19 MS. HASSELMAN: Objection. Asked and answered.

17:31:21 20 THE WITNESS: No.

17:31:30 21 BY MR. SULLIVAN:

17:31:30 22 Q. In terms of your complaint, is there

17:31:33 23 anything specific that you think that North Star

17:31:34 24 Trust Company did to not permit you to receive your

17:31:40 25 shares under the ESOP?

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

MAY 1 2008

Dated: \_\_\_\_\_

TRACY L. PERRY  
CSR No. 9577

1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby certify:

3 That the foregoing proceedings were taken  
4 before me at the time and place herein set forth; that  
5 any witnesses in the foregoing proceedings, prior to  
6 testifying, were duly sworn; that a record of the  
7 proceedings was made by me using machine shorthand  
8 which was thereafter transcribed under my direction;  
9 that the foregoing transcript is a true record of the  
10 testimony given.

11 Further, that if the foregoing pertains to  
12 the original transcript of a deposition in a Federal  
13 Case, before completion of the proceedings, review of  
14 the transcript [ ] was [ ] was not requested.

15 I further certify I am neither financially  
16 interested in the action nor a relative or employee  
17 of any attorney or party to this action.

18 IN WITNESS WHEREOF, I have this date  
19 subscribed my name.

20 Dated: MAY 1 2008

21   
22 \*  
23

24 CHRIS TE SELLE  
CSR No. 10836  
25

**EXHIBIT C**

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3 SAN FRANCISCO AND OAKLAND DIVISION

4  
5 **CERTIFIED**  
**COPY**

6 THOMAS FERNANDEZ, et al., )  
7 Plaintiffs, )  
8 vs. ) Case No.  
9 K-M INDUSTRIES HOLDING CO., INC., et al., ) C-06-07339 CW  
10 Defendants. )  
11 )  
12 )  
13 )  
14 )  
15 VIDEOTAPED DEPOSITION OF TOSHA THOMAS  
16 April 18, 2008  
17 San Francisco, California  
18  
19  
20  
21  
22 Reported by:  
23 EMI ALBRIGHT  
24 RPR, CSR No. 13042  
25 Job No. 79885

1 said employee stock option plan. I assume you mean  
2 employee stock ownership plan.

3 MR. HANNAN: Sure. I misspoke.

4 MS. HASSELMAN: I did not notice it until  
09:44 5 the question was already out, but we might want to  
6 re-ask it.

7 BY MR. HANNAN:

8 Q Let me make it clear. I misspoke and I  
9 apologize, Ms. Thomas. It's the employee stock  
09:44 10 ownership plan. Would your answer still be the same?

11 A Yes.

12 Q Now, did you become employed with  
13 Kelly-Moore sometime in July of 2000?

14 A Yes.

09:45 15 Q And was that your next employment after the  
16 Good Guys?

17 A Yes.

18 Q And how did you become -- happen to become  
19 employed with Kelly-Moore?

09:45 20 A Well, they had a job posting, so I applied  
21 for a job at the time, which was an opening for the  
22 mailroom.

23 Q All right. And you continued to be  
24 employed with Kelly-Moore until July 2 of 2007?

09:45 25 A Yes.

1 Q And as of July 2, 2007, you did not know  
2 anything about the existence of a lawsuit pertaining to  
3 the Kelly-Moore employee stock ownership plan; true?  
4 A Yes.

09:46 5 Q Now, initially you were employed in the  
6 mailroom at Kelly-Moore?

7 A Yes.

8 Q And how long were you employed in the  
9 mailroom?

09:46 10 A For about from the day I started for about  
11 a year, probably up until August of 2001.

12 Q And you, thereafter, became employed in  
13 what?

14 A The human resources department.

09:46 15 Q All right. And would you tell us what kind  
16 of work the human resources department at Kelly-Moore  
17 engaged in?

18 MS. HASSELMAN: Objection. Vague.

19 BY MR. HANNAN:

09:47 20 Q Do you understand the question?

21 A Can you repeat that, please?

22 Q Sure. What did you understand to be the  
23 purpose of the human resources department at  
24 Kelly-Moore?

09:47 25 MS. HASSELMAN: Objection. Vague and

1 is that?

2 A That was my relative of mine, that was her  
3 employer at the time.

4 Q I see. And how did you come to prepare  
10:10 5 these two pages of Exhibit 184?

6 MS. HASSELMAN: Objection. Vague.

7 A Sorry. Can you repeat it, please?

8 BY MR. HANNAN:

9 Q How is it that you went through the process  
10:10 10 of preparing these two pages, Exhibit 184?

11 A I just created the resume myself.

12 Q And had you seen some posting that  
13 indicated a position might be available with  
14 Kelly-Moore?

10:11 15 A Yes, it was in a newspaper at the time.

16 Q Now, you were employed with Kelly-Moore  
17 until I believe July 2 of '07; is that correct?

18 A Yes.

19 Q And what happened that caused you to leave  
10:11 20 Kelly-Moore?

21 A At the time when I left, I was -- I felt I  
22 was or I received discriminatory actions against myself  
23 and I worked in a hostile environment so I left the  
24 company.

10:11 25 Q All right. And what individual or

1 individuals engaged in discriminatory actions against  
2 you?

3 A At the time it was Debbie Culmer and  
4 Theresa Locascio.

10:12 5 Q I'm sorry. I did not catch the second one.

6 Theresa --

7 A Locascio.

8 Q Could you spell Locascio, for us?

9 A I believe it's L-o-c-a-s-c-i-o.

10:12 10 Q And what is it that Ms. Culmer did that you  
11 felt was discriminatory against you?

12 A Raising her voice at me numerous times in  
13 front of other employees, throwing paper towards me in  
14 front of everyone, talking down to me just making me  
10:12 15 feel bad in front of others as though she wasn't doing  
16 to other employees in the department.

17 MS. HASSELMAN: I am going to object to  
18 this line of questions. This is not relevant to the  
19 case at all. It's personal. If there is a reason that  
10:13 20 you can articulate to me that this is relevant to this  
21 case.

22 MR. HANNAN: Sure. It's highly relevant.  
23 It has to do with bias.

24 BY MR. HANNAN:

10:13 25 Q All right. And what is it that

1 Ms. Locascio did that caused you to conclude that she  
 2 was taking discriminatory action against you?

3 A She, herself, I felt she also did a form of  
 4 harassment by following me throughout the building. And  
 10:13 5 I did make a complaint regarding those actions.

6 Basically --

7 Q And --

8 A -- basically -- sorry to interrupt --  
 9 invading my space.

10:13 10 Q Is there -- is there anything else that she  
 11 did apart from that that you felt constituted  
 12 harassment?

13 A That was basically the gist of it, yeah.

14 MS. HASSELMAN: I am objecting that this  
 10:13 15 whole line of questions is outside the scope of what  
 16 could possibly lead to the discovery of admissible  
 17 evidence in this case. And I believe that there is not  
 18 a purpose to this line of questions other than to harass  
 19 the witness. So I will leave a standing objection to  
 10:14 20 this line of questions.

21 BY MR. HANNAN:

22 Q Returning to Ms. Culmer, have you told us  
 23 everything that Ms. Culmer did that you believe  
 24 constituted a discriminatory action against you?

10:14 25 A Yes.

1 Q And have you told us everything that  
2 Ms. Locascio did that you believe constituted  
3 discriminatory action against you?

4 A Yes.

10:14 5 Q All right. Now, you say you reported the  
6 action by Ms. Locascio. To whom did you report it?

7 A To Steve DeVoe.

8 Q And would you tell us who Mr. DeVoe was at  
9 the time?

10:14 10 A Well, at the time he is the president of  
11 Kelly-Moore Paint.

12 Q And when did you report this to Mr. DeVoe?

13 A I'm not -- I don't have exact dates but it  
14 was before I left the company.

10:15 15 Q Within a week?

16 A I would say maybe couple months before.

17 Q Couple of months before?

18 A Yes.

19 Q So it might have been in April or May?

10:15 20 A Yes.

21 MS. HASSELMAN: Objection. Calls for  
22 speculation. I realize it's a late objection, but it's  
23 to the question, so it might have been in April or May.  
24 And I am just going to renew my standing objection. I  
10:15 25 think you may need to wrap up this line of questions

1 because it sounds like you are conducting discovery on  
2 an entirely different case and you are just harassing  
3 the witness.

4 BY MR. HANNAN:

10:15 5 Q And tell us what you said to Mr. DeVoe and  
6 what he said to you with respect to that subject matter  
7 when you reported it to him.

8 A Well, I told him that I felt I was being  
9 mistreated, and I wanted to talk to him about the  
10:15 10 situations that were going on or that I experienced at  
11 the time. And one of his suggestions were that we  
12 should sit down -- me, myself, my manager and assistant  
13 manager should talk about the situation or the matters.

14 Q Anything else?

10:16 15 A No.

16 Q And what transpired after this conversation  
17 with respect to that subject?

18 A I'm sorry. What transpired? With myself  
19 and my supervisor or --

10:16 20 Q Yes, let's be precise.

21 A Okay.

22 Q A suggestion was made by Mr. DeVoe that  
23 there be a meeting. Did that take place?

24 A Yes.

10:16 25 Q And who was present?

A Debbie Culmer and Theresa Locascio. Also  
Lizzy Fernandez.

Q Now, Ms. Culmer was your supervisor. Who was Ms. Fernandez?

A She is a coworker that worked in human resources department.

Q      And what was the reason for her being present?

A Because she was a witness to some of the accusations -- or not accusations but some of the complaints that I made pertaining to Debbie Culmer and Theresa.

Q And Theresa was present?

A Yes.

Q And what transpired in that meeting?

A That basically for us to see if we can sit down and talk about the situations as a group and maybe it will resolve itself.

MR. HANNAN: I'm sorry. Could we have that answer read back?

(Record read by the reporter.)

BY MR. HANNAN:

Q And did you then sit down and have that discussion?

1 A Yes.

2 Q And what was the result of that discussion?

3 A Well, I thought that things would get  
4 better or change, and they did not.

10:18 5 Q All right. And did you suffer further  
6 instances of what you believe to be harassment after  
7 this meeting?

8 A Yes.

9 Q And did you make any complaint to anyone in  
10 connection with these further incidents?

11 A I did speak with Debbie Culmer, herself,  
12 regarding some of the incidents, which basically led --  
13 I mean, it did not resolve itself. So I felt there was  
14 no point to speak with her anymore about it.

10:18 15 Q But you did speak to her at least once  
16 after this group meeting?

17 A Yes.

18 Q And what did you say to her and she to you  
19 on that occasion?

10:18 20 A Well, I told her basically my feelings of  
21 feeling that I was being mistreated. Of course, she  
22 disagreed. And that was basically it.

23 MS. HASSELMAN: I am going to renew my  
24 objection here. I think you are completely far off  
10:19 25 field from what could possibly be relevant to this case.

1 You have not articulated how this could affect any way  
2 that Ms. Thomas could -- anything about anything that is  
3 relevant to this case. I think you are conducting  
4 discovery on another case. I am going to give you three  
10:19 5 more questions on this line and then we are going to  
6 need to stop and you are going to either move on to  
7 another line of questions or we are going to need to  
8 leave.

9 BY MR. HANNAN:

10:19 10 Q And did you make any effort to discuss this  
11 matter with Mr. DeVoe after the meeting you just  
12 described with Ms. Culmer?

13 A Yes, after I left the company, I spoke with  
14 him on the phone.

10:19 15 Q And when did that occur?

16 A Probably a week after my employment -- a  
17 week after I left Kelly-Moore Paint.

18 Q All right. And what did you say to him and  
19 he to you on that call?

10:20 20 MS. HASSELMAN: Objection. Compound.

21 A Basically that the mistreatment that I  
22 experienced from Debbie and that I can no longer work  
23 with her under those conditions. At the time I  
24 mentioned that I would like to work with Kelly-Moore but  
10:20 25 I can no longer work with her. And at the time my

1 position was the only one that was open, so I decided  
2 there wasn't an option for me.

3 MS. HASSELMAN: Let's take a break. We  
4 will go off the record.

10:20 5 THE VIDEOGRAPHER: We are off the record  
6 at 10:20 a.m.

7 (Recess 10:20 a.m.-10:41 a.m.)

8 THE VIDEOGRAPHER: We are back on the  
9 record. The time is 10:41.

10:42 10 MS. HASSELMAN: So as you know we've made  
11 an objection that this line of questions regarding the  
12 factual details surrounding Ms. Thomas' departure from  
13 Kelly-Moore and her concerns regarding discrimination is  
14 entirely irrelevant to this case and that the only  
10:42 15 purpose for asking these questions is to harass and  
16 upset the witness.

17 The way we think it makes the most sense to  
18 proceed is if -- to allow you to continue the line of  
19 questions for another few minutes. But if you have more  
10:42 20 than another ten minutes of questions on this line, we  
21 are going to need to get a magistrate judge on the phone  
22 in order to determine whether you are allowed to  
23 continue to ask this line of questions. And if the  
24 judge says you are, then you are. And that's how we  
10:42 25 best think it is to proceed.

1 A Anyone other?

2 Q Anyone at all after the moment in time when  
3 you hung up the telephone with Mr. DeVoe?

4 A Well, the only other person that I  
10:47 5 contacted was the unemployment office to basically  
6 provide information as to why I left the company.

7 Q And with whom did you speak at the  
8 unemployment office?

9 A I don't remember the name. It was just an  
10:48 10 unemployment claimant.

11 Q Claimant?

12 A A claims rep that takes, I guess, takes in  
13 the information.

14 Q All right. Now, you have made reference --  
10:48 15 let's go on beyond that.

16 A Okay.

17 Q After the discussion you had with the  
18 claims representative, did you have any further  
19 discussion at any time with anyone from Kelly-Moore  
10:48 20 about the subject matter of harassment?

21 A No.

22 Q You mentioned that there were racial  
23 comments made by upper management?

24 A Yes.

10:48 25 Q And those were directed at you?

1           A     I wouldn't necessarily say directed at me,  
2     but I took offense to it as being an African-American  
3     person.

4           Q     All right. And when did you first take  
10:49 5     offense at such comments?

6           A     I would say I heard it a few months or so  
7     before I left the company.

8           Q     Would this be then April or May of '07?

9           A     Probably I would say April.

10:49 10       Q     And how many instances were there of these  
11     comments?

12        A     To my knowledge it was just one particular  
13     comment.

14        Q     All right. And where did this comment  
10:49 15     occur?

16        A     In the human resources department.

17        Q     And who was present?

18        A     It was Lizzy Fernandez, Theresa Locascio,  
19     and Walter Leclerc.

10:49 20       Q     Walter Leclerc?

21        A     Leclerc.

22        Q     Would you spell Leclerc for us?

23        A     I believe it's L-e-c-l-e-r-c.

24        Q     All right. And who was it that made the  
10:50 25     first such comment?

1           A     Brought to my attention, it was Walter  
2           Leclerc that made the comment.

3           Q     Was there more than one comment?

4           A     No.

10:50    5           Q     What is it that Mr. Leclerc said?

6           A     He made a comment of I hope it's not  
7           another nigger.

8           Q     What was Mr. Leclerc's position at the time  
9           he made that comment?

10:50  10          A     I believe he was director of risk  
11       management.

12          Q     Is that an upper management position?

13          A     Yes.

14          Q     Now, had you in the past had some complaint  
10:50  15       involving a woman named -- I may not pronounce it  
16       correctly -- Voyce, V-o-y-c-e, or Voyce?

17          A     Yes.

18          Q     How is that pronounced?

19          A     Voyce, V-o-y-c-e.

10:51  20          Q     V-o-y-c-e?

21          A     Yes.

22           MR. HANNAN: All right. Mark as next in  
23       order Exhibit 185 what appears to be a copy of a  
24       Kelly-Moore memo dated January 12, 2004, revised January  
10:51  25       20, 2004, subject, harassment is illegal. And it has

1 Q Sure. Were you aware that harassment was  
2 illegal at the time that you suffered the harassment  
3 you've described?

4 A Yes, I was aware it's illegal.

10:53 5 Q And was it partly as a result of having  
6 received this Exhibit 185?

7 A No.

8 MR. HANNAN: Mark as Exhibit 186 what  
9 appears to be a copy of a memorandum from Debbie Culmer  
10:53 10 to Walter Leclerc. The subject is personnel issue. And  
11 its production number is KMH 011098.

12 (Exhibit No. 186 marked

13 for identification.)

14

15 BY MR. HANNAN:

16 Q Can you tell us what Exhibit 186 is,

17 Ms. Thomas?

18 MS. HASSELMAN: Objection. Vague. Calls  
19 for speculation.

10:54 20 A It looks basically just an e-mail from  
21 Debbie Culmer to Walter Leclerc.

22 BY MR. HANNAN:

23 Q And have you seen this document before?

24 A No.

10:54 25 Q All right. The document refers in the

1 first paragraph to a meeting with Toshia and Voyce. Do  
2 you recall that meeting?

3 A Yes.

4 Q All right. And what occasioned that  
10:54 5 meeting?

6 A I'm sorry. Can you repeat it, please?

7 Q Why did that meeting occur?

8 A Well, because Voyce was making  
9 inappropriate comments to me.

10:55 10 Q And what were these inappropriate comments?

11 A Calling -- she called me Uncle Tom. Said  
12 that I was white in the face, basically that I was  
13 trying to be white, basically.

14 Q And there is an "N" with a blank here. Did  
10:55 15 she also call you some word beginning with "N"?

16 A Nigger.

17 Q And who was Voyce?

18 A She was the receptionist at the time.

19 Q All right. And what race was Voyce?  
10:55 20 A African-American.

21 Q And did you complain to anyone about  
22 Voyce's conduct?

23 A To Debbie Culmer.

24 Q And what happened as a result of that  
10:55 25 complaint?

1           A     When I brought it to Debbie's attention the  
2 comments that Voyce made to me, that it bothered me, we  
3 arranged, or Debbie arranged for the three of us to sit  
4 down and have a discussion about it.

10:55   5       Q     And did that solve the problem?

6           A     I would -- totally, no, I mean, honestly,  
7 no.

8           Q     Did it continue to be a problem thereafter?

9           A     She did not make those comments afterwards  
10 but that does not erase the matter itself.

11          Q     All right.

12           MS. HASSELMAN:   Are you doing okay?

13           THE WITNESS:   Yeah.

14           BY MR. HANNAN:

10:56   15       Q     Now, did you take any action as a result of  
16 your experiences that constituted harassment?

17           MS. HASSELMAN:   Objection.  Vague and  
18 ambiguous.

19          A     You mean pertaining to this situation or --

20           BY MR. HANNAN:

21           Q     Well, let me -- that's not a good question.

22           Let me rephrase it.

23           You have indicated to us now that you  
24 experienced several incidents of what you considered to  
10:56   25     be harassment; true?

1 Q You cannot tell me whether you ever spoke  
2 with an attorney? I am not asking what you said, but  
3 did you ever speak with an attorney about the subject  
4 matter of harassment?

10:57 5 A Yes.

6 MS. HASSELMAN: Objection. You just asked  
7 about the subject matter of the conversation with the  
8 attorney. You can ask whether she spoke with an  
9 attorney and when but not anything about the subject  
10 matter.

11 BY MR. HANNAN:

12 Q I am not asking her what she said or what  
13 the attorney said. I am entitled to ask her whether  
14 with respect to this subject as opposed to her estate  
15 plan she spoke with an attorney.

16 And with what attorney or attorneys did you  
17 speak with regard to the subject matter of harassment?

18 A I contacted an attorney by the name of  
19 Peter Rukin.

10:58 20 Q Could you spell the last name for us?

21 A R-u-k-i-n.

22 Q All right. And did you speak to any other  
23 lawyer about this subject matter?

24 A No.

10:58 25 Q All right. And did you engage Mr. Rukin's

1 services?

2 A Did I engage his services?

3 Q Yes, as a lawyer?

4 A Yes.

10:58 5 Q And did he agree to represent you?

6 MS. HASSELMAN: Objection. You are  
7 getting into the content of the conversations at this  
8 point. I think you can ask it a different way that does  
9 not look so much like it's looking for the subject  
10 matter of the conversations.

11 BY MR. HANNAN:

12 Q Did Mr. Rukin --

13 MS. HASSELMAN: It's Rukin.

14 BY MR. HANNAN:

10:59 15 Q I'm sorry. Rukin. Pardon me. Strike  
16 that.

17 Did Mr. Rukin undertake to represent you  
18 with respect to the subject matter of harassment at  
19 Kelly-Moore?

10:59 20 A Well, we spoke about --

21 MS. HASSELMAN: Objection. This is the  
22 type of question that is very difficult to answer  
23 without getting into attorney client communications.

24 BY MR. HANNAN:

10:59 25 Q How about yes or no?

1 MS. HASSELMAN: Yes or no would be an  
 2 acceptable answer.

3 BY MR. HANNAN:

4 Q Would you give us a yes or no? Do you  
 10:59 5 recall the question?

6 A Can you repeat the question again, please?

7 Q Sure. Did Mr. Rukin undertake to represent  
 8 you with respect to the subject matter of harassment at  
 9 Kelly-Moore? Yes or no?

10:59 10 A No, not at this time, no.

11 Q Did he at any time undertake to represent  
 12 you with regard to that subject?

13 A No.

14 Q Have you taken any action, any legal action  
 11:00 15 of any sort with respect to that subject matter?

16 A Yes.

17 Q And what action have you taken?

18 A I contacted the EEOC.

19 Q And when did you do that?

11:00 20 A I believe it was maybe September of '07.

21 Q All right. And as a result of contacting  
 22 them, did you take any further action?

23 MS. HASSELMAN: Objection. Vague and  
 24 ambiguous.

11:00 25 A I'm sorry. As of -- can you repeat it,

1 please?

2 BY MR. HANNAN:

3 Q Sure. Did you do anything as a result of  
4 having contacted the EEOC?

11:00 5 MS. HASSELMAN: Same objection.

6 A I provided whatever information, but --

7 BY MR. HANNAN:

8 Q Did you file a complaint?

9 A Yes.

11:00 10 Q All right. And when did you file the  
11 complaint?

12 A I don't have an exact date, but I would say  
13 maybe September of '07.

14 Q All right. And what is the status of that  
11:01 15 complaint?

16 MS. HASSELMAN: Objection. Vague.

17 A Well, it's still in process.

18 BY MR. HANNAN:

19 Q And have you had any discussion with anyone  
11:01 20 about the subject matter of that complaint?

21 A I'm sorry. Discussion meaning?

22 Q With anyone about the subject matter of  
23 your EEOC complaint?

24 A No, just the EEOC themselves.

11:01 25 Q And with whom did you have that discussion

1 at the EEOC?

2 A Scott -- I believe his name is Scott  
3 Doutie.

4 Q And when did you have that discussion?

11:01 5 A It's been ongoing. Probably about maybe  
6 four or five months ago.

7 Q Have you had several discussions?

8 A Yes.

9 Q And when was the most recent of those  
11:01 10 discussions?

11 A I believe a couple weeks ago.

12 Q Now, you've testified that you first  
13 learned of the existence of this ESOP lawsuit after you  
14 left Kelly-Moore; true?

11:02 15 A I'm sorry? Repeat it, please.

16 Q If I understood your testimony, you  
17 testified that you first heard about the lawsuit you are  
18 here on today after you left Kelly-Moore; is that true?

19 A Yes.

11:02 20 Q All right. And when did you learn about  
21 this lawsuit?

22 MS. HASSELMAN: I am just going to caution  
23 the witness that the question of when you learned about  
24 the lawsuit is a proper question. You can answer it  
11:02 25 with a date. But make sure that we don't get into any

1 Q And would you look, please, at  
2 paragraph 27. That paragraph states among other things  
3 that the Kelly-Moore shares were valued at approximately  
4 \$6.88 per share.

11:12 5 MS. HASSELMAN: Objection. Misstates what  
6 the document says and also vague as to time.

7 BY MR. HANNAN:

8 Q How did you know that?

9 MS. HASSELMAN: Objection. Misstates  
11:13 10 prior testimony. Calls for a legal conclusion and  
11 potentially calls for attorney client communications.  
12 So if you can answer the question without getting into  
13 any communications to or from counsel, you can answer.  
14 And if not, you shouldn't.

11:13 15 A Can't answer that question.

16 BY MR. HANNAN:

17 Q Do you know whether it's true or not?

18 A No, I don't know that it's true.

19 Q Do you as you sit here today have any  
11:13 20 problem with how the shares were valued?

21 MS. HASSELMAN: Objection. Calls for a  
22 legal conclusion. Vague and ambiguous. Also vague as  
23 to time.

24 A Sorry. Please repeat it, please.

11:14 25 BY MR. HANNAN:

1 Q Yes. As you sit here right now, do you  
2 have any problem with the way the shares in Kelly-Moore  
3 were valued?

4 MS. HASSELMAN: Objection. Same  
11:14 5 objections.

6 A Yes.

7 BY MR. HANNAN:

8 Q What is your problem?

9 MS. HASSELMAN: Objection. Vague.

11:14 10 A That there was too much paid into the plan.

11 BY MR. HANNAN:

12 Q I see. And what amount was paid that was  
13 too much?

14 MS. HASSELMAN: Objection. Vague and  
11:14 15 ambiguous and calls for a legal conclusion.

16 A I don't know.

17 BY MR. HANNAN:

18 Q Well, how much too much was it?

19 MS. HASSELMAN: Objection. Calls for a  
11:14 20 legal conclusion. You are asking her to testify about  
21 damages. It's an issue for experts.

22 A I don't know. Can't answer that question.

23 BY MR. HANNAN:

24 Q Do you have any idea at all how much too  
11:15 25 much you believe was paid?

1 MS. HASSELMAN: Objection. Asked and  
2 answered.

3 A No.

4 BY MR. HANNAN:

11:15 5 Q Now, you also -- in this paragraph the  
6 complaint also says that money was borrowed from  
7 Kelly-Moore, 232 million. Do you have some problem with  
8 that?

9 MS. HASSELMAN: Objection. Misstates what  
11:15 10 the document says. Vague and ambiguous. Argumentative.

11 A You are asking me if I had any problem with  
12 it?

13 BY MR. HANNAN:

14 Q Yeah, is that a problem for you?

11:15 15 MS. HASSELMAN: Same objections.

16 A I don't know.

17 BY MR. HANNAN:

18 Q And then it also says here that Kelly-Moore  
19 in turn borrowed 136 million from CIG. What is CIG?

11:16 20 A California Insurance Group, I believe.

21 Q All right. And do you have a problem of  
22 any sort with Kelly-Moore allegedly borrowing  
23 136 million from CIG?

24 MS. HASSELMAN: Same objections. Vague  
11:16 25 and ambiguous. Calls for a legal conclusion.

1 Argumentative.

2 A I don't know.

3 BY MR. HANNAN:

4 Q All right. Would you look at paragraph 28.

11:17 5 A Okay.

6 Q And in part, paragraph 28 says that the  
7 defendant fiduciaries. Who are they?

8 MS. HASSELMAN: Objection. Calls for a

9 legal conclusion. Are you asking her or potentially ask  
11:17 10 her to characterize a part of the document that you  
11 haven't shown to her?

12 BY MR. HANNAN:

13 Q Who did you think they were when you read  
14 this in or about October of '07?

11:17 15 MS. HASSELMAN: Objection. Misstates  
16 prior testimony. Assumes facts not in evidence.

17 A I don't know. I have no idea.

18 BY MR. HANNAN:

19 Q Then it says whoever these fiduciaries  
11:17 20 were, that they failed to investigate adequately the  
21 qualifications of any valuation expert. Is that true?

22 A Is this line -- paragraph 28?

23 Q Yes, where it says -- the particular  
24 portion that says that the fiduciaries failed to  
11:18 25 investigate adequately the qualifications of any

1 valuation expert retained to prepare the valuation of  
2 KMH in connection, so on and so forth?

3 MS. HASSELMAN: It's paragraph 29.

4 BY MR. HANNAN:

11:18 5 Q I'm sorry. I misspoke. Let's go to  
6 paragraph 29, the paragraph. What facts do you base  
7 your understanding upon, if any, that the fiduciaries  
8 failed to adequately investigate the qualifications of  
9 any valuation expert retained to prepare the valuation  
11:18 10 of KMH?

11 MS. HASSELMAN: Objection. Calls for a  
12 legal conclusion. Assumes facts not in evidence.

13 A I don't know.

14 BY MR. HANNAN:

11:19 15 Q Going back to paragraph 28, is it true that  
16 the defendant fiduciaries failed to insure that they  
17 secured an independent expert assessment of the fair  
18 market value of the KMH Series P stock purchased by the  
19 plan on October 13, 1998?

11:19 20 MS. HASSELMAN: Objection. Calls for a  
21 legal conclusion. Vague and ambiguous.

22 A I don't know.

23 BY MR. HANNAN:

24 Q Would you turn to paragraph 32, please.  
11:20 25 Among other things paragraph 32 says that Kelly-Moore

1 Paint Company -- strike that.

2 Among other things, paragraph 32 says the  
3 valuation report of Kelly-Moore Paint Company prepared  
4 in connection with the October 13, '98 transaction  
11:20 5 failed to take into account KMH's potential liability in  
6 asbestos litigation. Is that true?

7 MS. HASSELMAN: Objection. The document  
8 speaks for itself. Characterization is incomplete.  
9 Calls for a legal conclusion. Calls for expert  
11:20 10 testimony.

11 A I don't know.

12 BY MR. HANNAN:

13 Q Do you have any facts at all in your  
14 possession that suggest to you that Kelly-Moore didn't  
11:21 15 adequately consider asbestos exposure in October of  
16 1998?

17 MS. HASSELMAN: Objection. Calls for a  
18 legal conclusion. Also you can answer to the extent  
19 that you have facts in your personal knowledge that  
11:21 20 don't -- that you can answer the question without  
21 getting into any communications from counsel. But if  
22 you have to reveal communications from counsel to answer  
23 the question, then you shouldn't.

24 A Can't answer the question.

11:21 25 BY MR. HANNAN:

1 Q That's because you don't know of any facts;  
2 true?

3 MS. HASSELMAN: Objection. Argumentative.  
4 Same objections as to the prior question.

11:21 5 A You are saying because I don't know of any  
6 facts?

7 BY MR. HANNAN:

8 Q You don't know of any facts to support that  
9 statement, do you?

11:21 10 MS. HASSELMAN: Same objections.

11 Argumentative.

12 A No.

13 BY MR. HANNAN:

14 Q Now, it also says in paragraph 32 that this  
11:21 15 significant asbestos liability was known to KMH  
16 management. Do you have any facts to support that  
17 claim?

18 MS. HASSELMAN: Same objections. Calls  
19 for a legal conclusion. Argumentative. Vague.

11:22 20 A I'm sorry. Paragraph 32?

21 BY MR. HANNAN:

22 Q Yes, it's toward the end of paragraph 32.

23 A No.

24 Q Now, in paragraph 33 it makes reference to  
11:22 25 something called tracking stock. What is tracking

1 stock?

2 MS. HASSELMAN: Objection. Vague. Calls  
3 for expert testimony. Calls for a legal conclusion.

4 A I don't know. I don't remember.

11:23 5 MS. HASSELMAN: Are you doing okay? Just  
6 let us know if you want a break.

7 MR. HANNAN: If you want to take a break,  
8 just let us know.

9 THE WITNESS: Yeah, I think so.

11:23 10 MR. HANNAN: Mark as next in order, which  
11 I believe is 187, what appears to be a Mind Our Own  
12 Business of Kelly-Moore Paint Company letterhead with  
13 the ESOP logo on the left side. And it is dated October  
14 2000. The production numbers are KMH 000087 through 92.

15 (Exhibit No. 187 marked  
16 for identification.)

17

18 MS. HASSELMAN: I think the witness has  
19 asked for a little break.

11:24 20 MR. HANNAN: I'm sorry. Do you want to  
21 take a break?

22 THE WITNESS: Yeah.

23 MR. HANNAN: Absolutely.

24 MS. HASSELMAN: We will deal with the  
11:24 25 exhibit when we come back.

1 BY MR. HANNAN:

2 Q And did you ever go to those files to look  
3 at any of these newsletters?

4 A Well, no, not if it's not necessarily  
13:22 5 pertaining -- pertaining to me, no.

6 Q Well, as of '01 you were a participant,  
7 were you not, in the ESOP?

8 A Yes.

9 Q All right. And did you as a participant in  
13:22 10 the ESOP attempt to pay attention to what was going on  
11 with the ESOP?

12 MS. HASSELMAN: Objection. Vague and  
13 ambiguous.

14 A In the beginning, no, not at the time.

13:23 15 MR. HANNAN: Mark as next in order  
16 Exhibit 192, a one page document. Appears to be a Mind  
17 Your -- excuse me -- Our Own Business newsletter,  
18 production No. KMH 010690.

19 (Exhibit No. 192 marked  
20 for identification.)

21  
22 BY MR. HANNAN:

23 Q Ms. Thomas, would you look at Exhibit 192  
24 and tell us whether you can identify that for us.

13:23 25 A This is a Mind Your Own Business document.

1 ESOP's purchase of Kelly-Moore stock may have been for  
2 more than fair market value due to the failure to  
3 discount the purchase price of the stock to account for  
4 the fact that the stock purchased by the plan was  
14:41 5 tracking stock?

6 MS. HASSELMAN: Objection. Compound.

7 Vague and ambiguous. Calls for a legal conclusion.

8 A Yes.

9 BY MR. HANNAN:

14:42 10 Q Now, how was it that the pension plan  
11 should have discounted the purchase price of the stock  
12 to account for the fact that it was tracking stock?

13 MS. HASSELMAN: Objection. A couple  
14 things. You said pension plan. But also calls for a  
14:42 15 legal conclusion and calls for expert testimony.

16 MR. HANNAN: I will withdraw the question  
17 because of the pension plan.

18 BY MR. HANNAN:

19 Q How was it in your understanding,  
14:42 20 Ms. Thomas, that the stock should have been discounted  
21 for the fact that it was tracking stock?

22 MS. HASSELMAN: Same objections. Calls  
23 for a legal conclusion. Calls for expert testimony.

24 A I don't know.

14:42 25 BY MR. HANNAN:

1 Q You read this complaint, did you not, and  
2 you saw paragraph 53?

3 MS. HASSELMAN: Objection. Misstates  
4 prior testimony. Argumentative. Asked and answered.

14:43 5 A Yes.

6 BY MR. HANNAN:

7 Q And it's being claimed on your behalf in  
8 this complaint that one of the issues had to do with a  
9 failure to discount the purchase price of the  
14:43 10 Kelly-Moore stock paid by the ESOP; correct?

11 A Yes.

12 Q Well, what was the problem?

13 MS. HASSELMAN: Objection. Calls for a  
14 legal conclusion. Vague and ambiguous. Calls for  
14:43 15 expert testimony.

16 A I don't know.

17 BY MR. HANNAN:

18 Q What do you understand that to mean?

19 MS. HASSELMAN: Same objections.

14:43 20 Argumentative. Asked and answered. Calls for a legal  
21 conclusion. Calls for expert testimony. Vague and  
22 ambiguous.

23 A I don't know.

24 BY MR. HANNAN:

14:44 25 Q What does it mean to you to discount the

1 purchase price?

2 MS. HASSELMAN: Objection. Vague and  
3 ambiguous.

4 A To discount the purchase price?

14:44 5 BY MR. HANNAN:

6 Q Yeah.

7 A To present something at a lower value than  
8 what it really is.

9 Q Okay. And I believe we asked this earlier,  
14:44 10 but do you know whether or not the stock was tracking  
11 stock?

12 A No, I do not know.

13 Q And particularly the so-called P stock, do  
14 you know the difference between P stock and I stock?

14:44 15 A No.

16 MR. HANNAN: All right. Mark as next in  
17 order Exhibit 199 what appears to be a memorandum from  
18 Robert Stetson to a series of addressees including  
19 Ms. Thomas. And it is dated August 24, 2005, production  
14:45 20 Nos. P 1230 and 31.

21 MS. HASSELMAN: I will just object that  
22 the document speaks for itself, and we don't have a  
23 foundation at this time as to whether the Ms. Thomas  
24 that Mr. Hannan has just represented appears on this  
14:45 25 document is, in fact, the plaintiff.

1 Q In connection with this lawsuit did you  
2 consider whether this lawsuit, if successful, might lead  
3 to the bankruptcy of Kelly-Moore?

4 A Yes.

14:48 5 Q And are you prepared to --

6 MS. HASSELMAN: I'm sorry. I need to  
7 object to the prior question as vague and ambiguous as  
8 to the term, this lawsuit.

9 BY MR. HANNAN:

14:48 10 Q Are you prepared to accept the risk of  
11 placing Kelly-Moore in bankruptcy if you are successful  
12 in this lawsuit?

13 MS. HASSELMAN: Objection. Vague and  
14 ambiguous. Accept the risk?

14:48 15 A Yes.

16 BY MR. HANNAN:

17 Q So sometime before August 24 of '05, you  
18 understood that the circumstances arising from the  
19 asbestos litigation were so severe that Kelly-Moore  
14:49 20 might end up in bankruptcy; correct?

21 A Yes.

22 MR. HANNAN: Mark as next in order a  
23 milestone, Exhibit 200, what appears to be a company  
24 newsletter, Mind Our Own Business, dated October 2005,  
14:49 25 production Nos. P 1126 through 29.

1 BY MR. HANNAN:

2 Q You had a right, did you not, that was  
3 legally protected to examine the annual report at the  
4 main office of the plan?

15:12 5 MS. HASSELMAN: Objection. Calls for a  
6 legal conclusion. Vague and ambiguous and vague as to  
7 time.

8 A I'm sorry. Please repeat the question.

9 BY MR. HANNAN:

15:12 10 Q You had a right, did you not, legally  
11 protected right to examine the annual report at the main  
12 offices of the plan?

13 MS. HASSELMAN: Same objections.

14 A Yes.

15:12 15 BY MR. HANNAN:

16 Q And you didn't do so?

17 A No, I did not.

18 Q And you didn't do so before you proceeded  
19 to become a plaintiff in this litigation; true?

15:12 20 MS. HASSELMAN: Same objections.

21 Argumentative. Calls for a legal conclusion.

22 A No, I did not.

23 BY MR. HANNAN:

24 Q Now, you also had a right to obtain at no  
15:13 25 charge a statement of assets and liabilities of the plan

1 and accompanying notes. You didn't do that?

2 A No, I did not.

3 MS. HASSELMAN: Same objections as to the  
4 prior questions.

15:13 5 BY MR. HANNAN:

6 Q Did it occur to you that the accompanying  
7 notes might provide useful information in determining  
8 whether or not the matters you were complaining about in  
9 this lawsuit were accurate?

15:13 10 MS. HASSELMAN: Objection. Argumentative.

11 Calls for a legal conclusion. Assumes facts not in  
12 evidence.

13 A Yes, it did.

14 BY MR. HANNAN:

15:13 15 Q But you didn't do anything about that?

16 A No, I did not.

17 Q And you also had a right -- strike that.

18 You also had a right to receive from the  
19 plan administrator a statement of income and expenses  
15:13 20 together with accompanying notes; correct?

21 MS. HASSELMAN: Objection. Calls for a  
22 legal conclusion. Vague as to time. Vague and  
23 ambiguous.

24 A Yes.

15:14 25 BY MR. HANNAN:

1 Q And you could have reviewed these notes to  
2 obtain information pertinent to this lawsuit before it  
3 was filed; true?

4 MS. HASSELMAN: Same objections.

15:14 5 A Yes.

6 BY MR. HANNAN:

7 Q But you didn't do so?

8 A No, I did not.

9 Q Now, although you don't recall receiving or  
15:14 10 seeing the '04 or '03 statements that are set forth in  
11 the second and third page of '04, do you have any reason  
12 to believe that you didn't receive them?

13 MS. HASSELMAN: Objection. Calls for  
14 speculation.

15:14 15 A I don't recall receiving '04 and '03, no.

16 BY MR. HANNAN:

17 Q But do you have any reason to think that  
18 they weren't provided to you?

19 MS. HASSELMAN: Objection. Asked and  
15:14 20 answered and calls for speculation. Do you mean any  
21 additional reason besides the fact that she doesn't  
22 remember ever seeing them?

23 A I just don't recall receiving them.

24 MR. HANNAN: Mark as next in order  
15:15 25 Exhibit 205, what appears to be a copy of a company Mind

1 Q But you believe you can represent the  
2 present employees?

3 MS. HASSELMAN: Objection. Calls for a  
4 legal conclusion.

15:56 5 A Yes.

6 BY MR. HANNAN:

7 Q What are your duties as a class  
8 representative?

9 A My duties? I believe to basically maybe  
15:56 10 step in and do whatever I can to receive anything that  
11 was entitled to myself and others.

12 Q Yourself and others?

13 A Yes.

14 Q Anything you are entitled to?

15:56 15 A Yes.

16 Q All right. What is a fiduciary duty?

17 MS. HASSELMAN: Objection. Calls for a  
18 legal conclusion. Vague and ambiguous.

19 A I don't know.

20 BY MR. HANNAN:

21 Q Do you understand that you if appointed as  
22 a class representative would be undertaking a fiduciary  
23 duty?

24 A No, I don't know.

15:56 25 MS. HASSELMAN: Same objections to the

1 second question as to the original question of what is a  
2 fiduciary duty.

3 BY MR. HANNAN:

4 Q Now, do you expect to receive anything for  
15:57 5 your services as a class representative?

6 MS. HASSELMAN: Objection. Vague and  
7 ambiguous.

8 A I would say so, yes.

9 BY MR. HANNAN:

15:57 10 Q What is it you expect to receive?

11 A Whatever money that was paid into the plan,  
12 I expect to receive that back.

13 Q Anything else?

14 A No.

15:57 15 Q Now, do you understand that if your lawsuit  
16 is unsuccessful that you may be required to pay the  
17 costs -- the defense costs of the lawsuit?

18 MS. HASSELMAN: Objection. Calls for a  
19 legal conclusion.

15:57 20 A Yes.

21 BY MR. HANNAN:

22 Q And are you prepared to do that?

23 A No, not at this time, no.

24 MR. HANNAN: Now, in the course of  
15:58 25 questioning, on several occasions you have instructed

1 A No, he did not.

2 MS. HASSELMAN: I have one other thing,  
3 but I actually need to go off the record for just one  
4 second and just fix something in one of the documents.

16:52 5 THE VIDEOGRAPHER: Off the record at  
6 4:52 p.m.

7 (Recess 4:52 p.m.-4:53 p.m.)

8 THE VIDEOGRAPHER: We are back on the  
9 record at 4:53 p.m.

10

11

12 EXAMINATION (Continuing)

13 BY MS. HASSELMAN:

14 Q Ms. Thomas, I am going to ask you to take a  
16:53 15 look back at the exhibit that were introduced earlier  
16 that was 193. It should be in the little pile just in  
17 front of you. Do you remember discussing this document  
18 earlier today?

19 A Yes.

20 Q And do you recall that you said your best  
21 estimate of when you first saw this document was in  
22 approximately April of 2002?

23 A Yes.

24 Q And in April of 2002 when you believe you  
16:54 25 first saw this document, do you recall whether you read

1 it thoroughly?

2 A No, I did not.

3 Q And could you look at the second page where  
4 there's a heading marked, asbestos litigation, that was  
16:55 5 also discussed earlier?

6 A Yes.

7 Q Do you recall whether you read that section  
8 thoroughly in April of 2002?

9 A No, I did not.

16:55 10 Q Do you recall whether you understood all  
11 the matters that are set forth in that paragraph headed,  
12 asbestos litigation, in April of 2002?

13 MR. HANNAN: Object as leading.

14 A Not completely, no.

16:55 15 MS. HASSELMAN: That's all we have.

16 THE VIDEOGRAPHER: This concludes the  
17 deposition of Tosha Thomas. Total number of tapes are  
18 three. They will be retained at Esquire Deposition  
19 Services in San Francisco. We are going off the record.

16:55 20 The time is 4:55 p.m.

21 (Deposition concluded at 4:55 p.m.)

22

23

24

25

STATE OF CALIFORNIA )

: ss )

County of Alameda )

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify: That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of any such attorney or counsel and that I am not financially interested in the said action or the outcome thereof;

IN WITNESS WHEREOF, I have this date subscribed my name.

APR 28 2008

Dated: \_\_\_\_\_

*Emi Albright*

EMI ALBRIGHT, CSR No. 13042